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IN THE

Supreme Court of the United States

Term, 1970
No. 1606

HARSH INVESTMENT CORPORATION,

Petitioner,

vs.

CURTIS B. DANNING, Receiver,

In Proceedings for an Arrangement under Chapter XI re: WALTER MINSKOFF, LEO A. MINSKOFF, JANE CHANEY MINSKOFF, GERTRUDE MINSKOFF, Debtors,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit which affirmed an order of the United States District Court for the Central District of California.

Opinion Below.

The United States District Court for the Central District of California filed an opinion dated April 22, 1968, which was not reported. A copy of said opinion is appended hereto as Appendix I.

The United States Court of Appeals for the Ninth Circuit filed its order on March 10, 1970, affirming the order of the District Court. That order is not reported but is appended hereto as Appendix II.

Jurisdiction.

1. The jurisdiction of this court is invoked to review a final decision of the Court of Appeals for the Ninth Circuit on the grounds that (a) the said Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court, and (b) the said Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court.

2. The date of the order sought to be reviewed is March 9, 1970, and the time of its entry is March 10, 1970.

3. No petition for rehearing was filed herein.

4. The statutory provisions believed to confer in this court jurisdiction to review the order in question by writ of certiorari is 28 U.S.C., Section 1254-(1).

Questions Presented.

Where a claim of a creditor in proceedings under Chapter XI of the Bankruptcy Act had been objected to by the receiver, and before an order was entered by the Referee in Bankruptcy either sustaining or denying the objection, an application was filed by the creditor to reopen the proceedings, and subsequent to the filing of the application to reopen, the Referee in Bankruptcy entered his order sustaining the receiver's objection to the claim from which order the creditor filed a Petition for Review one court day late, does the date of the ruling on the application to reopen the proceedings which application was accepted by the Referee heard on the merits and then ruled upon, extend the time for filing the Petition for Review from the order

sustaining the objection of the receiver to the claim of the creditor.

Constitutional Provisions, Statutes and Regulations Involved.

11 U.S.C.A., Section 67c (Bankruptcy Act, Section 39c) provides:

> "A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge. . . . Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. . . ."

Statement of the Case.

The facts material to the consideration of the questions presented are as follows:

On March 4, 1965, the debtors Walter Minskoff, Leo A. Minskoff, Jane Chaney Minskoff and Gertrude Minskoff, filed their individual petitions for arrangements under 11 U.S.C., Section 722 (Chapter XI of the Bankruptcy Act, Section 322). On February 24, 1967, the petitioner herein filed an amended proof of claim in each case. In December, 1967, the receiver (respondent herein) filed his objections to the claims of the petitioners on the ground that the amended proof of claim had been filed late under Section 93n of 11 U.S.C. (Section 57n, Bankruptcy Act). A hearing on those objections was held before the Referee in Bankruptcy on

January 11 and January 17, 1968. On February 8, 1968, the petitioner herein filed its application to reopen the proceedings, which was returnable on February 21, 1968. On February 20, 1968, the Referee entered his order sustaining the objection of the receiver to the claim of the petitioner. On February 21 and February 27, 1968, a hearing was held on the application of the petitioner to reopen the proceedings.

On March 4, 1968, the petitioner filed its Petition for Review from the order of February 20, 1968. On March 12, 1968, the Referee filed a written memorandum opinion, after hearing the petition on its merits which memorandum opinion denied to the petitioner the right to reopen the proceedings. A copy of said opinion is appended hereto as Appendix III.

The basis for federal jurisdiction in the court of first instance is 11 U.S.C., Section 47.

REASONS FOR GRANTING THE WRIT.

The writ of certiorari should be granted because the order of the District Court merely stating that the Petition for Review was "not filed within the time prescribed by Section 39c, of the Bankruptcy Act (11 U.S.C., Section 67c) (Appendix I), and that of the United States Court of Appeals for the Ninth Circuit dismissing the Petition for Review for failure to comply with the requirements of Section 39c of the Bankruptcy Act (Appendix II) leaves unanswered the question presented whether an application to reopen the proceedings which was accepted for filing by the Referee and heard upon the merits and considered and acted upon by the Referee in Bankruptcy extends the time for filing the Petition for Review until the date of the order on the application to reopen the proceedings. Thus an important question of federal law has not been decided by either the District or Circuit Courts but should be settled by this court.

Prior to the amendment in 1960, of 11 U.S.C., Section 67c (Bankruptcy Act, Section 39c) the law was set forth in *Pfister v. Northern Illinois Finance Corporation,* (1942) 317 U.S. 144, 87 L. Ed. 146, and *Bowman v. Loperena,* (1940) 85 L. Ed. 177, 311 U.S. 262. At page 266, the Supreme Court held in *Bowman:*

> "The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted upon or denied by the trial court, cannot operate to extend the time for appeal. *But where the court allows the filing, and after considering the merits, denies the petition, the judgment of the court as origi-*

nally entered does not become final until such denial and the time for appeal runs from the date thereof." (Emphasis ours.)

It is submitted that the amendment to 11 U.S.C., Section 67c, does not change the law as to the statements made in *Pfister* and *Bowman* that the time for filing a Petition for Review is extended by a hearing on an application to reopen the proceedings.

This question was made the subject of an article in Vol. 42, No. 4, October 1968 issue of the Journal of the National Conference of Referees in Bankruptcy, page 101, where at page 105, the author stated:

> "... if such order shows that the court merely consider the petition for rehearing and denied it, a motion for reconsideration filed late will not reestablish the time for review. But if the order shows that the petition for rehearing was granted and the basis for the original order was in any manner re-examined, then the time for review of the original order will be established anew as running from the time of the entry of the order entered upon the court's action granting or denying a modification or vacation of the original order."

The theory of permitting the time for review to run from the date of the denial of the application to reopen was affirmed in the case of *United States v. Healy,* (1964) 376 U.S. 75, 11 L. Ed. 2d 527, which although not a bankruptcy case was decided after the 1960 amendments to 11 U.S.C., Section 67c.

Although the Referee in Bankruptcy declared its opinion to be a memorandum opinion denying the application to reopen the proceedings and order thereon (Appendix III) an examination of that opinion would show that the objections of the receiver to the claim of the

petitioner was as a matter of substance, reconsidered and again passed upon the objections to the claim.

That the order of Referee in Bankruptcy denying the application to reopen the proceedings was considered by the United States Court of Appeals for the Ninth Circuit is evidenced by the order of said court filed February 3, 1969, a copy of which order is appended hereto as Appendix IV.

The orders of the District Court and the Court of Appeals do not answer the question whether the application to reopen the proceedings serves to extend the time for filing the Petition for Review. Both decisions might be said to have any one of the following results:

(a) That 11 U.S.C., Section 67c, as amended in 1960, now does not permit the application to reopen the proceedings to extend the time for filing the Petition for Review, or

(b) That the District Court and Court of Appeals held that because the Referee in Bankruptcy entitled his document "Memorandum Opinion Denying Application to Reopen Proceedings and Order Thereon" that the Referee had not decided the application on the merits and, therefore, it did not fall within the exceptions as set forth in *Bowman, supra.*

It should be emphasized that the petition to reopen the proceedings was timely filed in the within case; that it was filed prior to the court ruling on the objection of the receiver to the claim of the petitioner; that even though the petition to reopen was filed on February 8, 1968, and set for hearing on February 21, 1968, the Referee in Bankruptcy entered his order sustaining the objection to the claim on February 20, 1968.

It is submitted that the decision of both the District Court and the Court of Appeals state that the petition to reopen the proceedings does not extend the time to file the Petition for Review. If it is so, then such rulings are decisions on a question of federal law, heretofore not resolved, and which should be settled by this court. If it is contended that the District or Circuit Courts are by their decisions advising that the hearing on the application to reopen the proceedings was not decided by the Referee on its merits, such a ruling would be in direct opposition to the law as set forth in *Bowman v. Loperena, supra,* and *Pfister v. Northern Illinois Finance Corporation, supra,* which law it is submitted has not been repealed by the amendment to 11 U.S.C., Section 67c, of the Bankruptcy Act.

It is submitted that the amendment to 11 U.S.C., Section 67c of 1960, did not change the law as to the fact that the petition to reopen the proceedings served to extend the time for filing the Petition for Review from the order on the objection to the claim and that the time for filing the Petition for Review began to run from March 12, 1968, and not from February 20, 1968; and, therefore, the Petition for Review was timely filed.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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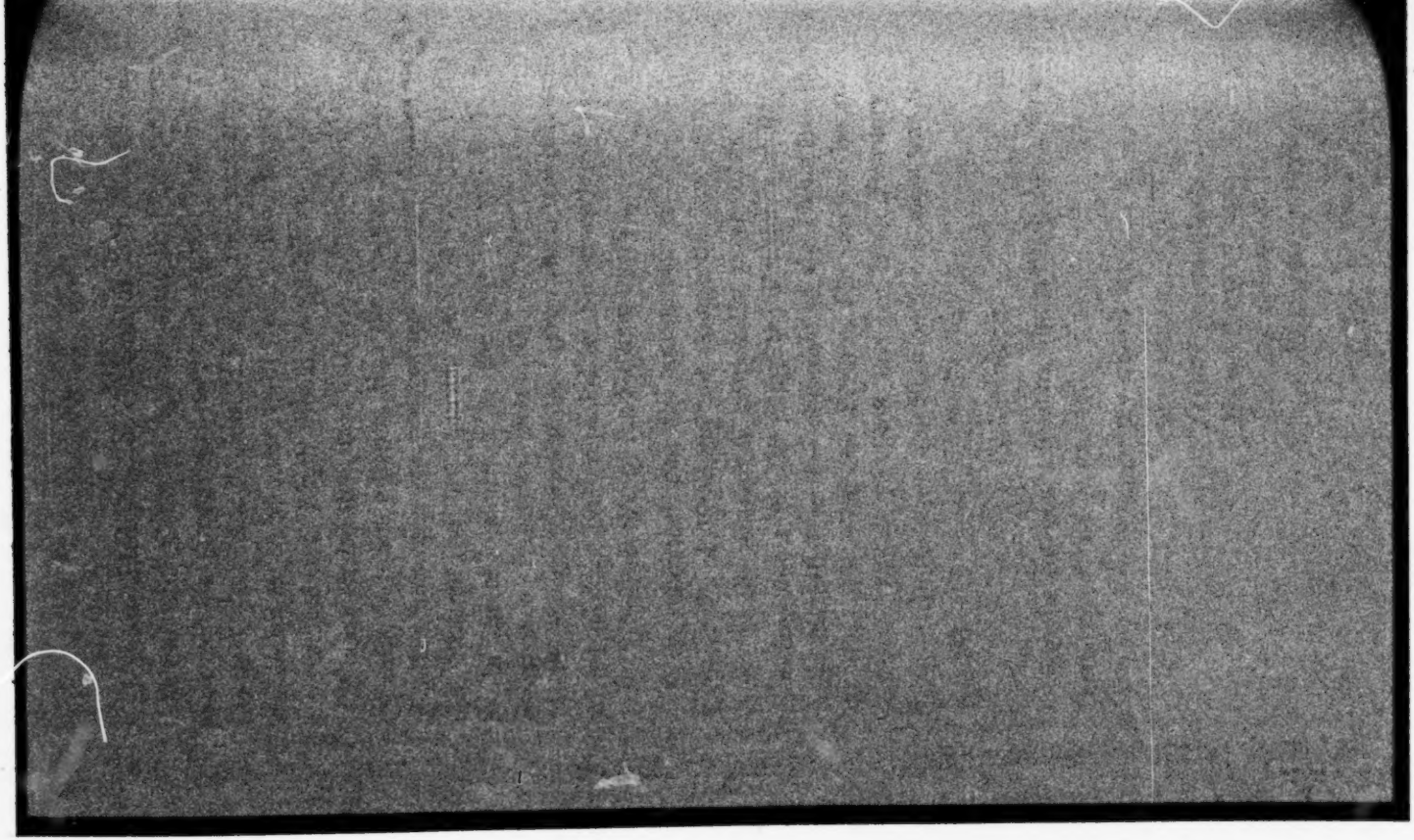
HARRY L. SCHUMAN,
HENRY COWAN, and
EDWARD I. HARRIS,
Attorneys for Petitioner.



APPENDIX I.

Opinion of the United States District Court for the Central District of California.

Order Dismissing Petition for Review (Harsh Investment Corporation).

On April 8, 1968, this matter came on regularly to be heard before the undersigned United States District Judge in his Courtroom upon the Petition for Review of HARSH INVESTMENT CORPORATION from the Order of the Honorable RAY H. KENNISON, Referee in Bankruptcy, entered on February 13, 1968, sustaining the Receiver's Objections to the "Amended Proof of Claim" of HARSH INVESTMENT CORPORATION and upon the Referee's Certificate on said Petition for Review, dated March 7, 1968. The Receiver appeared through his counsel, GENDEL, RASKOFF, SHAPIRO & QUITTNER by NATHAN MARKOWITZ, and HARSH INVESTMENT CORPORATION appeared through its counsel, NAT ROSIN and COWAN & HARRIS by HARRY L. SCHUMAN. The Referee's Certificate on Petition for Review certified as the facts in this case, which facts are submitted by HARSH INVESTMENT CORPORATION, the Petitioner on Review, that on February 20, 1968, the Referee in Bankruptcy filed his Findings of Fact, Conclusions of Law and his Order sustaining the Receiver's Objections to the "Amended Proof of Claim" of HARSH INVESTMENT CORPORATION on the ground that said claim was not timely filed; and that on March 4, 1968, 13 days after the entry of said Order, the within Petition for Review was filed. This Court hereby adopts said recitation of the facts by the Referee in Bank-

ruptcy. Upon the record certified to this Court by the Referee in Bankruptcy and upon all the proceedings heretofore had herein, this Court finds that said Petition for Review was not filed within the time prescribed by Section 39c of the Bankruptcy Act (11 U.S.C. §67c).

Now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the Petition for Review of HARSH INVESTMENT CORPORATION from the Order of the Honorable RAY H. KINNISON, Referee in Bankruptcy, entered February 20, 1968, which Petition for Review was filed herein on March 4, 1968, be and the same is hereby dismissed as not filed within the time prescribed by Section 39c of the Bankruptcy Act (11 U.S.C. §67c).

DATED: April *22*, 1968.

/s/ Charles H. Carr
United States District Judge

APPENDIX II.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Order.

Appeal from the United States District Court for the Central District of California

BEFORE: TUTTLE,* HUFSTEDLER, and KILKENNY, Circuit Judges.

For the reason stated by the District Court in its order entered April 24, 1968, dismissing appellant's Petition for Review (failure to comply with the requirements of section 39c of the Bankruptcy Act), that order is AFFIRMED.

/s/ Shirley Hufstedler
Shirley Hufstedler, Circuit Judge

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*Hon. Elbert Parr Tuttle, Senior Judge for the Fifth Circuit Court of Appeals, Atlanta, Georgia, sitting by designation.

APPENDIX III.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In Consolidated Proceedings
for an Arrangement

Memorandum Opinion Denying Application to Reopen Proceedings and Order Thereon.

The present proceeding is an Application to Reopen Proceedings, filed by the claimant Harsh Investment Corporation (hereinafter referred to as "Harsh") to a Memorandum Opinion of this Court dated January 23, 1968, and to the Findings of Fact, Conclusions of Law and Order entered thereon on February 20, 1968. By such order the Court sustained the Receiver's objection to the claim of Harsh as being a claim filed after the period of time prescribed by Sec. 57n. of the Bankruptcy Act for the filing of claims.

Pertinent dates involved herein are as follows:

March 4, 1965, date of filing of petition under Sec. 322 of the Bankruptcy Act.

April 5, 1965, date of first meeting of creditors herein.

October 5, 1965, last date for filing of claims under Sec. 355 and 57 n. of the Bankruptcy Act.

February 24, 1967, date of filing of claim of Harsh.

October 12, 1967, date of confirmation of plan herein.

November 28, 1967, date of amendment to Sec. 355 of the Bankruptcy Act.

January 11 and 17, 1968, date of hearing on Receiver's objections to claim filed by Harsh.

Counsel for the claimant now contends that the law in effect at the date of the hearing on the objection to the Harsh claim is controlling. With this contention, the Court cannot agree for the several reasons hereinafter set forth.

I

At all times during these proceedings, up to and including the date of confirmation of the plan herein. Sec. 355 of the Bankruptcy Act provided as follows:

> "Where a petition is filed under section 322 of this Act, subdivision n of section 57 of this Act shall apply."

Section 57 n. of the Act provided, in part, as follows:

> "Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed."

On November 28, 1967, Congress passed Public Law 90-156 [81 Stat. 510] amending Section 355 of the Bankruptcy Act to read as follows:

> "Creditors, including the United States, any state, and any subdivision thereof, shall file their proofs of claim before confirmation except as follows:
>
> (1) If scheduled by the debtor, a claim may be filed within 30 days after the date of mailing notice of confirmation to creditors but shall not be allowed for an amount in excess of that set forth in the debtor's schedules; and
>
> (2) A claim arising from rejection of an executory contract of the debtor may be filed within such time as the court may direct."

It is a well established rule of law that statutes will be applied prospectively and not retrospectively, unless it was the clear intent of the legislative body that the law should be applied retrospectively. The United States Supreme Court has many times stated this well established rule.

> "The first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'"
>
> Union Pacific Railroad Co. v. Laramie Stockyard Co. (1913) 231 U.S. 190, 199, 58 L. Ed. 179, 34 S. C. 101

> "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."
>
> U. S. v. Heth (1806) 3 Cranch 399, 413, 2 L. Ed. 479, 483

> "Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears."
>
> U. S. v. Magnolia Petroleum Co. (1928) 276 U. S. 160, 162, 72 L. Ed. 509, 48 S. C. 236

See also:

Brewster v. Gage (1930) 280 U. S. 327, 337, 74 L. Ed. 50 S. C. 115

Hassett v. Welch (1938) 303 U. S. 303, 314, 82 L. Ed. 858, 58 S. C. 559

Fullerton Co. v. Northern Pacific Ry. Co. (1925) 266 U. S. 435, 437, 69 L. Ed. 367, 45 S. C. 143

U. S. v. St. Louis Railway Co. (1925) 270 U. S. 1, 3, 70 L. Ed. 435, 46 S. C. 182

Had Congress intended that the amendment to Sec. 355 apply to pending cases it would have been easy enough for it to have said so. (cf. In re Burke (D.C. So. Cal. 1948) 6 F. S. 5, 9)

The legislative history of the amendment to Sec. 355 does not indicate that Congress intended the amendment to apply to pending cases. On the contrary, it appears to be the clear Congressional intent that the amendment be applied prospectively only. (See Senate Report No. 751 on H. R. 2519, U. S. Code Congressional and Administrative News, December 11, 1967, pages 3268-3274, and House of Representatives Report No. 122 of March 14, 1967, introduced as Exhibit "A" herein.)

II

Where a statute creates a right, which right was unknown to the common law and limits the time within which the right must be asserted, the limitation defines and controls the right, and the right ceases to exist if not asserted within the time fixed by the statute therefor.

Bomer v. Ribicoff (6th Cir. 1962) 304 F. 2d 427, 429

Ewing v. Risher (10th Cir. 1949) 176 F. 2d 641, 644

Scott v. Railroad Retirement Board (7th Cir. 1955) 227 F. 2d 684, 686

Robinson v. Celebrezze (D.C. Tenn. 1964) 237 U. S. 115, 116

Harsh contends that a statute merely effecting the remedy may apply to and operate on causes of action accrued and existing at the time of the enactment of the statute. Section 57 n. and 355 of the Bankruptcy Ac, however, go much further than merely effecting a remedy. The Bankruptcy Act, and especially Chapter XI thereof, creates rights which were unknown as common law. Among others, it creates the right to file a claim in a bankruptcy proceeding and to receive a dividend on such claim.

The Court in Matheny v. Porter (10th Cir. 1946) 158 F. 2d 478, 479, in construing the Emergency Price Control Act, 50 U.S.C.A. App. Sec. 901, et seq. stated as follows:

> "It creates the right of action and fixes the time within which a suit for the enforcement of the right must be commenced. It is a statute of creation, and when the period fixed by its terms has run, the substantive right and the corresponding liability end. Not only is the remedy no longer available, but the right of action itself is extinguished. The commencement of the action within the time is an indispensable condition of the liability."

The same principle has been applied to the statute of limitations contained in the following Acts:

1. The Admiralty Act, Sec. 5, 46 U.S.C.A. Sec. 745; the Jones Act, 46 U.S.C.A. 688; and the Federal Employers Liability Act.

   Osbourne v. U. S. (2nd Cir. 1947) 164 F. 2d 767

2. Suits in Admiralty Act, 46 U.S.C.A. Secs. 741-752; and the Public Vessels Act, 46 U.S.C.A. Sec. 784-790.

   Sgambati v. United States (2nd Cir. 1942) 172 F. 2d 297, 298

3. The Social Security Act, 42 U.S.C.A. Secs. 402(G)

   Ewing v. Risher (10th Cir. 1949) 176 F. 2d 641, 644

4. The Securities Act of 1933, 15 U.S.C.A. Sec. 77 L. (2)

   Pennsylvania Company for Insurance v. Deckert (3rd Cir. 1941) 123 F. 2d 979, 985

5. Employers Liability Act of 1908, 45 U.S.C.A. Sec. 51-59

   Atlantic Coast Railroad v. Burnette (1915) 239 U.S. 199, 60 L. Ed. 226, 36 S. C. 75

6. Merchants Marine Act of 1920, 46 U.S.C.A. 597

   Port v. Litolff (5th Cir. 1939) 103 F. 2d 302

Since the statute of limitations contained in both the old and new Sec. 355 is part of the over-all statutory scheme created by the Bankruptcy Act, which created and limits rights unknown at common law, that statute of limitations is substitutive rather than procedural in

effect and affects the right, as well as the remedy, and cannot be retroactively applied.

William Danzer & Co. v. Gulf R. R. Co. (1925) 268 U.S. 633, 636, 69 L. Ed. 1126, 45 S. C. 612, 613

III

The rights of creditors and priority of payment in a Chapter XI proceeding are determined by the law in effect on the date of the filing of the petition for arrangement.

Goggin v. California Labor Div. (1948) 336 U. S. 118, 127, 130, 93 L. Ed. 543, 69 S. C. 469

White v. Stump (1942) 266 U. S. 310, 313, 69 L. Ed. 301, 45 S. C. 103

In re Hansen Bakeries, Inc. (3rd Cir. 1939) 103 F. 2d 665, 666, 667

In re Lieb Bros., Inc. (D.C. N.J. 1957) 150 F. S. 68, 70, 71

In re Weil (D.C. Pa. 1941) 39 F. S. 618

cf In re O'Gara Coal Co. (7th Cir. 1926) 12 F. 2d 426, 431, cert. den. 271 U. S. 683, and

In re Hamilton (D.C. Mich, 1937) 19 F. S. 333, 334

Upon the above authorities, and for the reasons given,

IT IS HEREBY ORDERED that the Application to Reopen Proceedings be and is hereby denied.

Dated: March 12, 1968.

/s/ Ray H. Kinnison
Referee in Bankruptcy

APPENDIX IV.

Order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before; ELY and HUFSTEDLER, Circuit Judges.

Upon consideration of appellee's motions to dismiss appeals, it is ordered that the motion to dismiss the appeal numbered 23261 is denied; that the motion to dismiss the appeal numbered 23028, a nonappealable order, is granted; and that the record heretofore filed in appeal numbered 23028 may be considered as a part of the record in appeal numbered 23261.

/s/ Walter Ely
/s/ Shirley Hufstedler
United States Circuit Judges

October Term, [illegible]
No. [illegible]

Harsh Investment Corporation,

Petitioner,

vs.

Curtis B. Danning, Receiver, In Proceedings for an Arrangement under Chapter XI re: Walter Minskoff, Leo A. Minskoff, Jane Cherney Minskoff, Gertrude Minskoff, Debtors,

Respondents.

Respondents' Answering Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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Respondents.

Respondents' Answering Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Question Presented.

Where prior to entry of an Order sustaining objections to a creditor's proof of claim, the creditors files a motion to reopen the objection to claim proceeding, which motion the Referee in Bankruptcy denies after entering the Order sustaining the objection to that creditor's claim, is the ten day time limit prescribed by Bankruptcy Act §39c (11 U.S.C. Section 67c) for filing a Petition for Review from the Order sustaining the objection to claim:

(1) Extended so as not to begin to run until entry of the Order denying the motion to reopen the objection to claim proceeding; or,

(2) Inelastic and not extended so that the Petition for Review, filed more than ten days after entry of the Order sustaining the objection to the creditor's claim, but within ten days of entry of the Order denying the creditor's motion to reopen the objection to claim proceeding, is late filed and must be dismissed.

Statute Involved.

Section 39c of the Bankruptcy Act (11 U.S.C. §67c) provides, in pertinent part:

> "A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten day period may for cause shown allow, file with the referee a petition for review of such order by a judge . . . Unless the person aggrieved shall petition for review of such order within such ten day period, or any extension thereof, the order of the referee shall become final. . . ."

Statement of the Case.

On March 4, 1965, the Minskoffs each filed individual Petitions for an Arrangement under Chapter XI of the Bankruptcy Act (11 U.S.C. §301 *et seq.*) and on March 12, 1965, the Referee in Bankruptcy sent a notice to all of the creditors, including Petitioner, who received same, advising all creditors that their proofs of claim must be filed within six months of April 5, 1965, namely, on or before October 5, 1965.

On February 24, 1967, approximately seventeen months after the claim filing period had expired, and approximately two weeks after the Minskoffs filed a proposed Plan of Arrangement, Petitioner filed with the Referee a document entitled, "Amended Proof of Claim".

On December 12, 1967, Respondent objected to Petitioner's "Amended Proof of Claim" on the grounds that said claim was not an amended claim and was not filed within the six month period prescribed by §57n of the Bankruptcy Act (11 U.S.C. §93n). In January, 1968, hearings were held on the objection to Petitioner's "Amended Proof of Claim", the Referee filed a Memorandum Opinion sustaining the objection, but no Order was entered until February 20, 1968. Notice of entry of the Order of February 20, 1968, was, on that date, sent by the Referee's clerk to all parties to the objection to claim proceeding, including Petitioner. A copy of that Notice of Entry of Order is appended hereto as Appendix I.

Rule 204(a) of the Bankruptcy Rules of the U.S. District Court for the Central District of California provides (and provided on February 20, 1968):

> "RULE 204, REVIEWS OF REFEREES' ORDERS.
>
> (a) An order of a referee shall be deemed entered when signed and filed with an appropriate filing mark in the referees' office. The referee shall upon filing of the order, give written notice by mail of the entry of the order to any party who has filed a written request therefor."

Although Petitioner filed no such written request with the Referee, Petitioner was given, on the date of entry, a notice of entry of the Order of February 20, 1968.

On February 8, 1968, twelve days prior to the entry of the Order sustaining the objections to Petitioner's "Amended Proof of Claim", Petitioner filed its application to reopen the objection to claim proceeding to amend its answer. On March 4, 1968, three calendar days after expiration of the time prescribed by §39c of the Bankruptcy Act (11 U.S.C. §67c), Petitioner filed a Petition for Review of the Order of February 20, 1968, which sustained Respondents' objection to Petitioner's "Amended Proof of Claim". The District Judge dismissed the Petition for Review as late filed and the Court of Appeals for the Ninth Circuit affirmed.

On March 12, 1968, the Referee filed his Memorandum Opinion and Order denying Petitioner's Application to reopen the objection to claim proceeding. Petitioner filed a separate Petition for Review, which was denied by the District Judge. A separate Notice of Appeal was filed from this latter Order, but the Court of Appeals for the Ninth Circuit, on Respondents' Motion, dismissed that appeal since the Order denying the Motion to reopen was a non-appealable Order. A copy of the Notice of Motion and the Opinion of the Court of Appeals for the Ninth Circuit thereon is appended hereto as Appendix II.

Reasons for Denying the Writ.

Petitioner urges granting the requested Writ since the Orders of the District Court and the Court of Appeals for the Ninth Circuit leave ". . . unanswered the

question presented whether [the] application to reopen . . . extend[ed] the time for filing the Petition for Review . . ." (Petition for Certiorari, p. 5). The key to this shallow argument is the word "presented". Both Courts below considered Petitioner's above stated contention and ruled that Petitioner failed to timely file its Petition for Review as required by §39c of the Bankruptcy Act (11 U.S.C. §67c). Thus, both Courts below clearly answered Petitioner's above stated contention in the negative and there is, therefore, no important question of Federal law not decided by the Courts below requiring this Court's action.

Petitioner asserts (Petition, pp. 5-6) that the July, 1960 amendment to §39c of the Bankruptcy Act (11 U.S.C. §67c) did not change the law with respect to a motion for rehearing extending the time for the filing of a petition for review, relying upon the cases of *Pfister v. Northern Illinois Finance Corporation,* 317 U.S. 144 (1942) and *Bowman v. Loperena,* 311 U.S. 262 (1940). Both cases were decided prior to the July, 1960 amendment to §39c of the Bankruptcy Act (11 U.S.C. §67c) and led to the enactment of that amendment. Petitioner fails to cite any post-1960 case which supports its theory, except for *United States v. Healy,* 376 U.S. 75 (1964), *a non-bankruptcy case* which, of course, did not deal with the 1960 amendment to §39c of the Bankruptcy (11 U.S.C. §67c). We will deal with these cases in order.

Bowman v. Loperena, supra, dealt with an untimely petition for rehearing of an order entered by the District Judge, and not by a Referee in Bankruptcy. Since appeals from the Orders of a District Judge in bankruptcy proceedings are governed by rules different from

those which govern Petitions for Review of the Orders of Referees in Bankruptcy, this case does not support Petitioner's position.

In *Pfister v. Northern Illinois Finance Corporation, supra,* untimely petitions for rehearing were followed by the filing of late petitions for review. The Court of Appeals affirmed that then §39c (11 U.S.C. §67c) governed, the time for review is not extended by the petitions for rehearing, there was no basis for reversing the Conciliation Commissioner's action on the petitions for rehearing and that the petitions for review were not filed timely. This Court upheld the Court of Appeals upon the first three grounds, affirmed the Judgment, but disagreed upon the last ground on the assumption that the language of the Court of Appeals meant that the District Court was "without power" to review the orders. Relying upon *Bowman v. Loperena, supra,* this Court ruled that the then §39c of the Bankruptcy Act (11 U.S.C. §67c) was not a limitation on the sound discretion of the District Court to permit the filing of petitions for review after the expiration of the prescribed time period but was, rather, a limitation on the person aggrieved to file such a petition as a matter of right. The section, as it then existed, provided for the filing of a petition for review of the order complained of ". . . within ten days after the entry thereof or within such extended time as the court may for cause shown allow, . . ."

Pfister thus destroyed the finality of referees' orders by subjecting them to late review. Congress, to eliminate this undesirable result and to make the ten day review time mandatory and exclusive, abrogated the *Pfister* and *Bowman* rule by amending §39c of the

Bankruptcy Act (11 U.S.C. §67c) in July, 1960 to make the referee's order final unless the aggrieved party files a petition for review within ten days of the entry of the order complained of, or within such ". . . extended time as the court upon petition filed within such ten day period may for cause shown allow, . . ." This amendment was recommended by the Judicial Conference of the United States, and the Senate Report said, in part:

> "There is now uncertainty as to the finality of a referee's order under this doctrine [*Pfister v. Northern Illinois Finance Corp.*] that a bankruptcy court may entertain an untimely petition for review even in the absence of an extension of time. The purpose of the bill is to fix a definite period of time within which an application for review must be filed.
>
> "The bill amends section 39c so as to make it clear that a petition for review must be filed within the prescribed 10-day period or within such extended time as the Court may allow upon petition for extension itself filed within such 10-day period."
>
> Senate Report No. 1689, 86th Congress, Second Session; 1960 U. S. Code Congressional and Administrative News, pp. 3194, 3195.

A fully copy of the above Senate Report is set forth in Appendix III.

Petitioner did not cite below, and has not cited in this Court, any bankruptcy case decided after the 1960 amendment to Section 39c of the Bankruptcy Act (11 U.S.C. §67c) in support of its theory that a motion to reopen extends the time within which to file a pe-

tition for review. *United States v. Healy, supra,* was a criminal case in which the Government filed a notice of appeal more than thirty days after judgment, but within thirty days after its motion for rehearing was denied by the District Judge. This Court held that the timely filed petition for rehearing, until disposed of by the District Court, rendered the judgment not final for purposes of appeal. This Court, then, as a dictum, stated that the rule was the same in civil appeals. However, we are not here dealing with an appeal, either civil or criminal, from the order of the District Judge, but rather with a petition to review the order of a Referee in Bankruptcy. We note also that *Bowman v. Loperena, supra,* dealt with a petition for rehearing of an order entered by a District Judge as extending the appeal time and was not concerned with a petition for rehearing of an order entered by a Referee in Bankruptcy or with a petition for review to the District Judge. Since appeals from the orders of a District Judge in bankruptcy proceedings are governed by rules different from those which govern petitions for review of the orders of Referees in Bankruptcy, neither *Bowman* nor *Healy* support Petitioner's contention.

Under Rule 4(a) of the Federal Rules of Appellate Procedure (28 U.S.C.) motions for rehearing and for new trials, if filed timely, toll the period within which a notice of appeal must be filed from an adverse order of the District Court. However, that Rule does not include petitions for review, but applies solely to appeals being perfected from an order of the District Court. While a "Court of Bankruptcy" includes the District Courts, a Referee in Bankruptcy is not a "Judge" and, though he may exercise certain powers of

a District Court, he is not the District Court. Review of the Referee's orders is by the District Judge pursuant to §39c of the Bankruptcy Act (11 U.S.C. §67c). Only after the District Judge enters his order on the review does the appellate procedure come into play.

Bankruptcy Act, Section 1(10) (20), 11 U.S.C. §1(10), (20);

Matter of Williams Supply Co., Inc., 77 F. 2d 909 (C.A. 2, 1935), cert. denied *sub nom. Witt v. Berman*, 296 U.S. 612 (1935);

2 *Collier on Bankruptcy*, 1011 (14th Ed.).

Appeals in bankruptcy are thus treated separately and differently from petitions for review and are governed by special rules. While the Federal Rules of Appellate Procedure (derived and removed from the former Federal Rules of Civil Procedure) are applicable to bankruptcy appeals, General Order in Bankruptcy No. 36 (28 U.S.C.) does not make the Federal Rules of Appellate Procedure (and heretofore did not make the Federal Rules of Civil Procedure) applicable to petitions for review to the District Judge from an order of a Referee in Bankruptcy. Rather, petitions for review of the Referee's Order were always, as they should be, and still are, governed solely by the provisions of §39c of the Bankruptcy Act (11 U.S.C. §67c).

Both by General Order in Bankruptcy No. 37 and Rules 81(a)(1) of the Federal Rules of Civil Procedure (28 U.S.C.), the Federal Rules of Civil Procedure (and to the extent that the Federal Rules of Appellate Procedure are derived therefrom) were never applicable in bankruptcy proceedings when inconsistent with the provisions of the Bankruptcy Act. Since present §39c

of the Bankruptcy Act (11 U.S.C. §67c) makes mandatory the ten day filing period for a petition for review and, failing such a filing, makes the order of the Referee in Bankruptcy final, any of the Federal Rules of Civil or Appellate Procedure, or the cases decided thereunder, not in a bankruptcy, which would otherwise extend that time, conflict with the provisions of §39c of the Bankruptcy Act (11 U.S.C. §67c) and do not apply to petitions for review from a Referee's order.

Note also that Petitioner filed its application to reopen the objection to claim proceedings on February 8, 1968, twelve days prior to the signing of the Referee's order sustaining the objection to Petitioner's "Amended Proof of Claim" and then, on March 4, 1968, three days late, Petitioner filed its petition for review of the order sustaining the objection to its late filed proof of claim. If, as Petitioner asserts, its application to reopen extended the review time, why did Petitioner file a petition for review at all on March 4, 1968, rather than waiting to file its petition for review until after the Referee's order denying Petitioner's application to reopen? Clearly, Petitioner did not rely on its application to reopen to extend the review time, but rather just filed its review late and is seeking to excuse its failure to file timely. Further, since a Referee's order is not reviewable until entered, Petitioner's application to reopen, filed prior to the signing and entry of the order sustaining the objection to Petitioner's late filed claim, could not extend the review time since it had not yet begun to run and there was nothing to review.

2 Collier on Bankruptcy, 1503 (14th Ed.);

In re DuPont, 290 Fed. 393 (D.C. Mass., 1923).

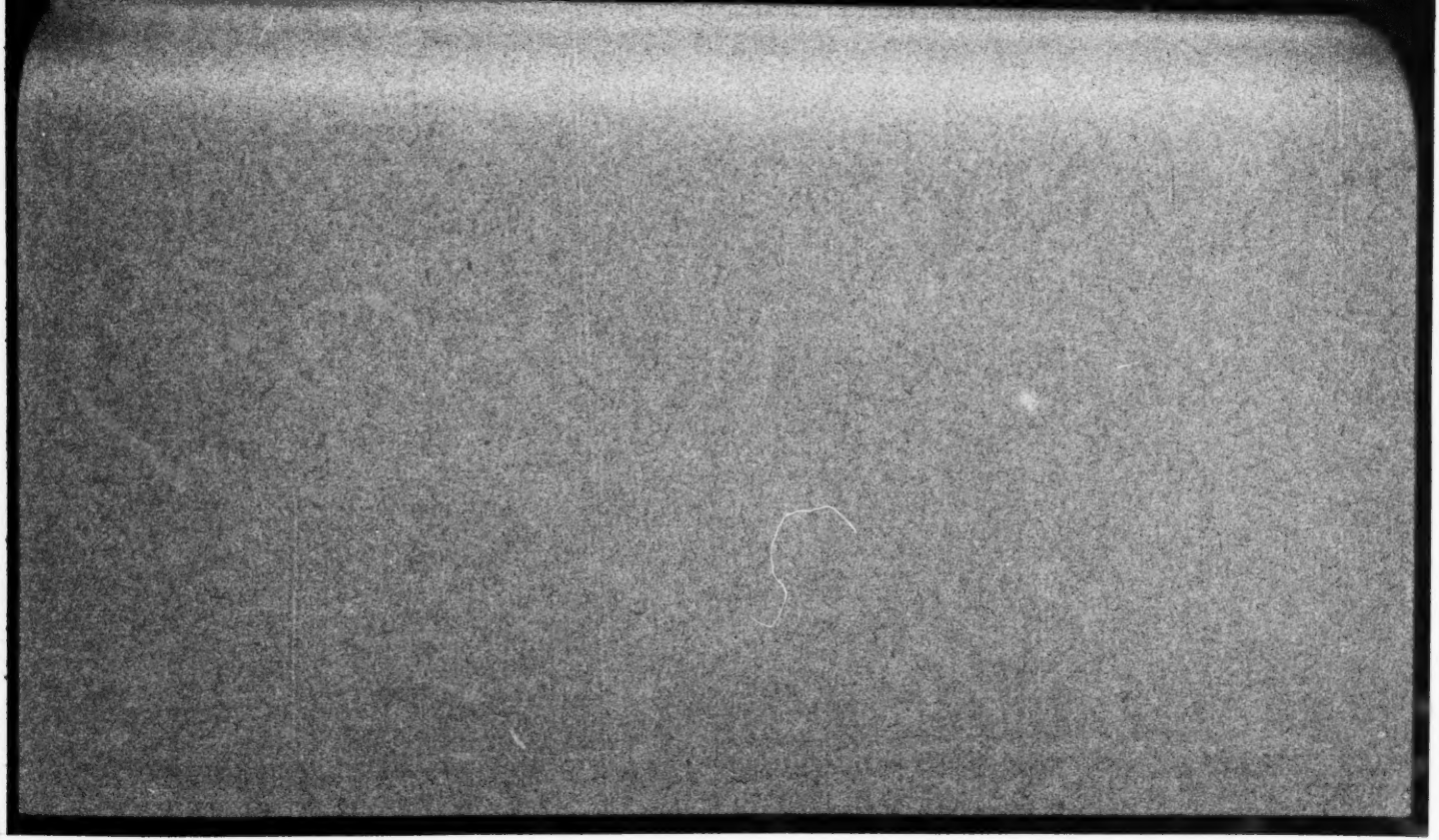
Conclusion.

The 1950 amendment to §39c of the Bankruptcy Act (11 U.S.C. §67c), expressed an intent by Congress that there be finality to bankruptcy litigation by making the Referee's order final unless a petition for review is filed within ten days of the entry of the order sought to be reviewed or an extension is obtained within that same ten day period. To permit the extension of this time limitation by the filing of a petition to reopen, support for which is not found either in the Bankruptcy Act or in the cases relating thereto, would forever leave the Bankruptcy Court to the mercy of the unsuccessful litigant who, so long as he could exercise his ingenuity to file such motions, would be able to fend off the ultimate result of the Referee's ruling. That result is neither called for nor reasonable.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GENDEL, RASKOFF, SHAPIRO &
QUITTNER, and
NATHAN MARKOWITZ,
Attorneys for Respondent.



APPENDIX I.

Notice of Entry of Order.

United States District Court, Central District of California.

In the Matter of Walter Minskoff, Leo A. Minskoff, Jane Chaney Minskoff, Gertrude Minskoff, Debtors. No. 185,836, 185,837, 185,838 and 185,839.

TO: NAT ROSIN and COWAN & HARRIS
Suite 300
1813 Wilshire Boulevard
Los Angeles 57, California

GENDEL, RASKOFF, SHAPIRO & QUITTNER
8380 Wilshire Boulevard - 16th Floor
Los Angeles, California 90048

QUITTNER, STUTMAN, TREISTER & GLATT
639 South Spring Street, Suite 325
Los Angeles, California 90014

NOTICE IS HEREBY GIVEN of the entry of the following order:

Date of Entry	Description of Order	Remarks
Feb. 20, 1968	FINDINGS OF FACT AND CONCLUSIONS OF LAW RE RECEIVER'S OBJECTION TO "AMENDED PROOF OF CLAIM" OF HARSH INVESTMENT CORPORATION, etc.	As prepared by GENDEL, RASKOFF, SHAPIRO & QUITTNER,
Feb. 20, 1968	ORDER RE RECEIVER'S OBJECTION TO THE "AMENDED PROOF OF CLAIM" OF HARSH INVESTMENT CORPORATION, etc.	As prepared by GENDEL, RASKOFF, SHAPIRO & QUITTNER,

Dated: February 20, 1968.

/s/ Ray H. Kinnison
Referee in Bankruptcy

I hereby certify that the within notice was sent by me to the parties above named, by United States Mail, this 20th day of February, 1968.

/s/ Imogene D. Patton

APPENDIX II.

Appellee's Motion to Dismiss Appeals; Affidavit of Nathan Markowitz; Memorandum of Points and Authorities; Affidavit of Service.

In the United States Court of Appeals, for the Ninth Circuit.

Harsh Investment Corporation, Appellant, vs. Curtis B. Danning, etc., Appellee. No. 23028.

Harsh Investment Corporation, Appellant, vs. Curtis B. Danning, etc., Appellee. No. 23261.

Filed: Jan. 14, 1968.

To the Honorable Judges of the United States Court of Appeals, for the Ninth Circuit:

CURTIS B. DANNING, Appellee, through his counsel, Gendel, Raskoff, Shapiro & Quittner, by Nathan Markowitz, of counsel, respectfully moves this Court to dismiss the within appeals of Harsh Investment Corporation, Appellant, on each and all of the following grounds:

1. Appeal No. 23028.

   (a) This appeal is frivolous.

   (b) An Order denying an application to reopen proceedings or to file an amended or supplemental pleading, (or denying a petition for rehearing as Appellant now characterizes its application before the Referee in Bankruptcy) is not an appealable Order.

   (c) This Court is without jurisdiction to entertain this appeal since the Order which is the subject of this appeal:

      (1) Is not an appealable Order;

(2) Is reviewable only for gross abuse of discretion upon an appeal from the final judgment in the objection to claim proceeding in which it was made and that judgment is not appealable since Appellant's Petition for Review was filed late.

2. Appeal No. 23261.

(a) This appeal is frivolous since Appellant concedes the correctness of the Order of April 22, 1968, dismissing its Petition for Review as late filed.

(b) The 10 day filing requirement for a Petition for Review is mandatory and not extended by an application to the Referee in Bankruptcy either for rehearing, to reopen the proceedings or to file an amended answer.

WHEREFORE, Appellee respectfully moves that this Court, after appropriate hearing, dismiss both appeals herein and enter the proposed Order attached hereto.

DATED: January 10, 1969.

Respectfully Submitted,

GENDEL, RASKOFF, SHAPIRO & QUITTNER and
NATHAN MARKOWITZ
By: /s/ Nathan Markowitz
NATHAN MARKOWITZ
Attorneys for Appellee.

APPENDIX III.

Order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: ELY and HUFSTEDLER, Circuit Judges.

Upon consideration of appellee's motions to dismiss appeals, it is ordered that the motion to dismiss the appeal numbered 23261 is denied; that the motion to dismiss the appeal numbered 23028, a nonappealable order, is granted; and that the record heretofore filed in appeal numbered 23028 may be considered as a part of the record in appeal numbered 23261.

/s/ Walter Ely
/s/ Shirley Hufstedler
United States Circuit Judges

APPENDIX IV.

Bankruptcy—Review of Orders of Referees.

For text of Act see p. 602

Senate Report No. 1689, June 24, 1960 [To accompany H.R. 6556]

House Report No. 585, June 26, 1959 [To accompany H.R. 6556]

The Senate Report is set out.

Sentate Report No. 1689

The Committee on the judiciary, to which was referred the bill (H.R. 6556) to amend subdivision c of section 39 of the Bankruptcy Act (11 U.S.C. 67c) so as to clarify time for review of orders of referees, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

PURPOSE

The purpose of the bill, as amended, is to clarify the filing time for review of orders of referees in bankruptcy.

STATEMENT

The bill is recommended by the Judicial Conference of the United States.

Section 39c of the Bankruptcy Act (11 U.S.C. 67c) now provides:

> c. A person aggrieved by an order of a referee may, within ten days after the entry thereof, or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall

> set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

A failure to file a petition for review of a referee's order within the prescribed 10 days after the entry of the order has generally been held, unless an extension is granted, to be fatal to the petition for review.

The Supreme Court, however, has held that a bankruptcy court may, in its discretion, grant an extension even after the expiration of the 10-day period. The Court held (Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 153 (1942)) that although 39c limits an aggrieved party in seeking review as a matter of right after the 10-day period, it places no limitation upon the discretion of the bankruptcy court to entertain a petition for review after the expiration of that period.

There is now uncerainty as to the finality of a referee's order under this doctrine that a bankruptcy court may entertain an untimely petition for review even in the absence of an extension of time. The purpose of the bill is to fix a definite period of time within which an application for review must be filed.

The bill amends section 39c so as to make it clear that a petition for review must be filed within the prescribed 10-day period or within such extended time as the court may allow upon petition for extension itself filed within such 10-day period.

The amendment recommended by the Administrative Office of the U. S. Courts to the bill as passed by the House of Representatives provides further, for the pur-

poses of clarification, that unless the person aggrieved shall petition for review of such order within such 10-day period, or an extension thereof, the order of the referee shall become final.

The committee believes that the bill as passed by the House of Representatives and as amended for purposes of clarification, as recommended by the Administrative Office of the U. S. Courts, is meritorious and recommends it favorably.

Attached and made a part of this report are (1) a letter, dated April 16, 1959, from the Administrative Office of the U. S. Courts and (2) a letter, dated June 16, 1960, from the Administrative Office of the U. S. Courts.

Administrative Office of the U.S. Courts,
Washington, D. C., April 16, 1959.

Hon. Sam Rayburn,
Speaker, House of Representatives,
Washington, D. C.

Dear Mr. Speaker: There is transmitted herewith, on behalf of the Judicial Conference of the United States, a bill to amend subdivision c of section 39 of the Bankruptcy Act (11 U.S.C. 67c) so as to clarify the time for review of orders of referees.

An explanation of the proposed bill is attached. Representatives of this office will be glad to appear before the committee and to provide any further information which may be desired concerning the bill.

Respectfully,

Warren Olney III, *Director*.

Legislative History.

EXPLANATION OF PROPOSED BILL TO AMEND SUBDIVISION C OF SECTION 39 OF THE BANKRUPTCY ACT (11 U.S.C. 67) SO AS TO MAKE IT CLEAR THAT A PETITION FOR REVIEW BY ORDER OF REFEREE MUST BE FILED WITHIN THE PRESCRIBED 10-DAY PERIOD UNLESS TIME IS EXTENDED BY THE COURT

Subdivision c of section 39 now reads:

"c. A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest."

Subdivision c was added to section 39 by the Chandler Act of 1938 for the purpose of clearly outlining the procedure to be followed in obtaining a review of a referee's order, and in the interest of certainty and uniformity. Prior to the Chandler Act, the right to have orders of the referee reviewed by the judge was governed by General Order 27. Subdivision c incorporated into the act the essence of former General Order 27, which has been abrogated. It also was intended to remedy a previous deficiency in both the Bankruptcy Act

and the general orders in that a definite period of 10 days has been provided as the time in which to file a petition for review. General Order 27 contained no time limitation, though local rules in various districts prescribed a time within which the application must be filed. (See "Collier on Bankruptcy." 14th ed. vol. 2, sec. 39.16. See also "Remington on Bankruptcy," vol. 8, sec. 3406.)

Section 39c stipulates "ten days after the entry thereof" as the period within which a petition for review of a referee's order must be filed. Generally the failure to file within this time, unless an extension is granted, is fatal to the petition for review. However, in In re Steinberg (S.D. Calif. 1956) 138 F.Supp. 462), the court held that the expiration of the 10-day period does not preclude the court from entertaining a petition for review, having power to exercise its own discretion in the matter. The effect of the expiration of the 10-day period is only that a petitioner cannot have a review as a matter of right. (See "Collier on Bankruptcy," 14th ed. vol. 2, sec. 39.20, and the other cases cited under note 8.)

Uncertainty as to the finality of a referee's order now exists because of the holdings of some courts that a bankruptcy court may entertain an untimely petition for review, even in the absence of an extension of time. In view of this an amendment to section 39c is needed that will fix a definite period of time within which an application for review must be filed. The bill would amend section 39c so as to make it clear that the petition for review must be filed within the prescribed 10-

day period or within such extended time as the court may allow upon petition for extension filed within such 10-day period.

The Judicial Conference of the United States, at its meeting in March 1959, upon the recommendation of its Committee on Bankruptcy Administration, approved the proposed measure.

Administrative Office of the U. S. Courts,
Washington, D. C., June 16, 1960.

Hon. James O. Eastland,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D. C.

Dear Senator Eastland: At the direction of the Judicial Conference of the United States an amendment is recommended to H.R. 6556, to amend subdivision c of section 39 of the Bankruptcy Act to clarify the time for review of orders of referees. This bill passed the House on July 6, 1959, and is now pending before the Senate Judiciary Committee.

The Judicial Conference, at its September 1959 meeting, approved a recommendation of its Committee on Bankruptcy Administration that the bill as passed by the House be amended by inserting after the second sentence the following:

> "Unless the person aggrieved shall petition for review of such order within such 10-day period, or any extension thereof, the order of the referee shall become final."

The Judicial Conference also authorized the Administrative Office to present the amendment to the Senate Judiciary Committee. The Conference at its March 1960 meeting reaffirmed its approval of the bill with the amendment. Therefore, it is asked that the bill be so amended and enacted into law.

Sincerely yours,

Edwin L. Covey,
Chief of Bankruptcy.